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IN THE
COURT OF APPEALS OF INDIANA

TYRONE BRADSHAW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0606-CR-510
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Priscilla Fossum, Judge Pro Tem
Cause No. 49G05-0603-FB-38009

April 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Tyrone Bradshaw appeals following a bench trial in which he was convicted of unlawful possession of a firearm by a serious violent felon, a Class B felony, robbery, a Class C felony, battery, a Class A misdemeanor, and battery, a Class B misdemeanor, and in which he was determined to be an habitual offender. On appeal, Bradshaw raises two issues, which we restate as whether Bradshaw's jury trial waiver with respect to the habitual offender determination was made knowingly, voluntarily, and intelligently, and whether sufficient evidence supports his robbery conviction. Concluding that Bradshaw did not knowingly, voluntarily, and intelligently waive his right to a jury trial, we reverse and vacate the trial court's habitual offender determination. Concluding that sufficient evidence supports Bradshaw's robbery conviction, we affirm the trial court in all other regards.

Facts and Procedural History

On January 24, 2006, Wendy Johnson was at her apartment visiting with her friend, Lamont Mumford, and her mother, Brenda Kanote. Bradshaw, who was apparently in a relationship with Johnson at this time, arrived at the apartment and became upset. Bradshaw slapped Johnson, who fled the apartment, and ordered Mumford to leave. Bradshaw followed Mumford out of the apartment, pulled out a handgun, and ordered Mumford to empty his pockets. Mumford testified that he had roughly $800 in his pocket, and that he removed this money from his pockets and threw it on the ground. Bradshaw picked up the money and then struck Mumford on the head with the handgun. Mumford left in his vehicle and called the police. Bradshaw returned to the apartment and told Kanote that he had "ho

smacked that dude" and taken all his money. Kanote explained that by "ho smacked" she understood that Bradshaw meant he had pistol-whipped Mumford.

On March 1, 2006, the State charged Bradshaw with unlawful possession of a firearm by a serious violent felon, a Class B felony, robbery, a Class B felony, battery, a Class C felony, carrying a handgun without a license, a Class C felony, and battery, a Class A misdemeanor.[1] On March 29, 2006, Bradshaw signed a jury waiver form, and the court orally advised Bradshaw of his rights, which Bradshaw indicated he understood. The State had not yet decided whether it intended to waive its right to a jury trial, and did not sign the jury waiver form until April 4, 2006. At the March 29 hearing, after the conversation between the trial court and Bradshaw regarding jury rights, the following exchange took place:

> State: It's enhanceable and there's –
> Court: Well, there's no enhancement yet, as I understand it.
> Defense: Right, Your Honor.
> State: Well, it certainly will be filed prior to the – when's the omnibus date, I . . .
> Court: Seventeenth of April.
> State: I mean, if we're going to trial on it, it will be enhanced by the time –
> Defense: We'll try to resolve something, Your Honor.
> Court: And it sounds like he's inviting discussion, Mr. Mohler [State's attorney], sooner rather than later.
> State: Right, Your Honor, definitely.
> Court: At a court trial an enhancement doesn't take that long.
> ***
> Court: Then let's set this for 8:45 on the 12th of April for a pre-trial conference; vacate April 18 and indicate that at the pre-trial conference, if no deal is reached, the State under – the defendant understands the State will be filing the habitual and I would appreciate it if you would forego filing before

[1] See Ind. Code §§ 35-47-4-5 (possession of handgun by a serious violent felon); 35-42-5-1 (robbery); 35-42-2-1 (battery); 35-47-2-1, -23 (carrying a handgun without a license).

the 11th or 12th or whatever date we just set.

Supplemental Transcript at 7-10.

On April 27, 2006, the State filed an information charging Bradshaw with being an habitual offender. On May 8, 2006, the trial court held a bench trial and found Bradshaw guilty on all counts, and entered judgments of conviction for possession of a handgun by a violent felon, robbery, and two counts of battery.[2] The trial court sentenced Bradshaw to ten years for possession of a handgun by a serious violent felon, enhanced by fifteen years for Bradshaw's status as an habitual offender, four years for robbery, one year for Class A misdemeanor battery, and 180 days for Class B misdemeanor battery. The trial court ordered that the sentences run concurrently for an aggregate sentence of twenty-five years. Bradshaw now appeals.

Discussion and Decision

I. Addition of the Habitual Offender Count After Jury Waiver

A criminal defendant is guaranteed the right to a jury trial under both the United States and Indiana Constitutions. Gonzalez v. State, 757 N.E.2d 202, 204 (Ind. Ct. App. 2001), trans. denied (citing U.S. Const. amend. VI and Ind. Const. art. I, § 13). This right applies to habitual offender proceedings. Id. at 205; Ind. Code § 35-50-2-8(f), (g). "It is fundamental error to deny a defendant a jury trial unless there is evidence of the defendant's knowing, voluntary and intelligent waiver of the right." Id. (quoting Reynolds v. State, 703 N.E.2d

[2] Out of double jeopardy concerns, the trial court entered a judgment of conviction for robbery as a Class C felony instead of a Class B felony, battery as a Class A misdemeanor instead of as a Class C felony,

701, 704 (Ind. Ct. App. 1999)). In order to effectively waive the right, "[t]he defendant must express his personal desire to waive a jury trial and such a personal desire must be apparent from the court's record." Poore v. State, 681 N.E.2d 204, 206 (Ind. 1997).

Bradshaw does not argue that his waiver was not knowing, voluntary, and intelligent with regard to any charge except the habitual offender count, which the State added after Bradshaw signed the waiver form. We have addressed substantially this same issue in Jones v. State, 810 N.E.2d 777 (Ind. Ct. App. 2004), and O'Connor v. State, 796 N.E.2d 1230 (Ind. Ct. App. 2003). In both Jones and O'Connor we held that the defendant's waiver with respect to the habitual offender information added after the defendant signed a waiver form was not a knowing, voluntary, and intelligent waiver. Jones, 810 N.E.2d at 780; O'Connor, 796 N.E.2d at 1235.

Here, the record contains no evidence that at the time Bradshaw signed the waiver form or orally advised the trial court that he understood the rights he was waiving he had been advised of his right to a jury trial on the habitual offender determination. Thus, his waiver with regard to this determination could not have been knowing and intelligent. See O'Connor, 796 N.E.2d at 1235. Although the discussion at the March 29 hearing included mention of the likelihood that the State would file the habitual offender count, this discussion took place after Bradshaw had signed the waiver form, and after the court's discussion with Bradshaw regarding his right to a jury. In O'Connor, we noted:

As the discussion at the pre-trial conference about the extension of the

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battery as a Class B misdemeanor instead of as a Class A misdemeanor, and did not enter a judgment of conviction for carrying a handgun without a license.

> omnibus date and the possibility of the State filing the habitual offender information, such occurred after O'Connor waived her right to a jury trial and thus is not pertinent to whether O'Connor's prior waiver of a jury trial was a knowing and intelligent waiver of her right to a jury trial with regard to her habitual offender status.

Id. We find the same logic to apply to this case; the discussion of the habitual offender count at the March 29 hearing is irrelevant as to whether Bradshaw's prior waiver was knowing, voluntary, and intelligent.

The State asks us to conclude Bradshaw's waiver was knowing, voluntary, and intelligent despite Jones and O'Connor. However, we find the reasoning of our previous decisions persuasive, and decline the State's invitation to re-visit the issue. We hold that Bradshaw's waiver with regard to his habitual offender determination was not made knowingly, voluntarily, and intelligently. As in Jones and O'Connor, we therefore reverse the habitual offender determination, vacate the sentence enhancement imposed, and remand to the trial court for further proceedings consistent with this opinion.

II. Sufficiency of the Evidence

A. Standard of Review

When reviewing a claim of insufficient evidence, we will not reweigh evidence or judge witnesses' credibility. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). We will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. Id. We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. Id.

B. Evidence Supporting Robbery Conviction

In order to convict a defendant of robbery, the State must prove the defendant: 1) "knowingly or intentionally [took] property from another person"; 2) by the use or threat of force, or by putting a person in fear. Ind. Code § 35-42-5-1. Bradshaw argues that the State introduced insufficient evidence to support a finding that Bradshaw took property from Mumford. We disagree.

At trial, Mumford testified that Bradshaw told Mumford, "empty your pockets or I'm going to start shooting." Tr. at 17. Mumford then emptied his pockets, which contained roughly $800, and Bradshaw picked this money up off the ground. Kanote testified that when Bradshaw returned to the apartment, he told her that he had pistol-whipped Mumford and taken his money. Bradshaw argues that this evidence is insufficient because the money was not recovered and introduced into evidence. However, Bradshaw cites no authority for the proposition that one cannot be convicted of robbery unless the State introduces the property taken from the victim. Indeed, such evidence is not required, as "[i]t is well-settled that the uncorroborated testimony of the victim can sustain a robbery conviction." Threats v. State, 582 N.E.2d 396, 397-98 (Ind. Ct. App. 1991), trans. denied. Also, as a practical matter, the inability of the State to recover money stolen in a robbery should hardly preclude a conviction. As the State notes, the fact that Bradshaw did not have the money on him when he was arrested several days after the robbery could merely indicate that Bradshaw had spent or otherwise disposed of the money in the time since the robbery.

Here, the State introduced not only the testimony of the victim indicating that Bradshaw had robbed him, but also the corroborating testimony of Kanote. Bradshaw argues

that Mumford's testimony was "inherently incredible in alleging that he had that much money." Appellant's Brief at 9-10. Mumford testified that he was carrying $800 because he had recently received his tax refund in the amount of $7,000. Bradshaw argues that Mumford's tax return check should not have been that large, as Mumford is employed as a custodian making roughly $28,000 per year. This argument boils down to a request that we judge Mumford's credibility. We decline this invitation and conclude that the testimony of Mumford and Kanote is sufficient to support Bradshaw's robbery conviction.

Conclusion

We conclude that Bradshaw's jury waiver was not knowing, voluntary, and intelligent with regard to the habitual offender determination. Therefore, we reverse the habitual offender determination and vacate the sentence enhancement. We also conclude that sufficient evidence supports Bradshaw's conviction for robbery.

Affirmed in part, reversed in part, and remanded.

SULLIVAN, J., and VAIDIK, J., concur.